

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WOMBLE BOND DICKINSON  
(US) LLP,  
1200 19<sup>th</sup> Street NW  
Suite 500  
Washington, DC 20036

Plaintiff,

v.

FEDERAL COMMUNICATIONS  
COMMISSION,  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Defendant.

Civil Action No. 19-cv-\_\_\_\_\_

**COMPLAINT FOR DECLARATORY RELIEF PURSUANT TO FOIA  
COMPELLING THE PRODUCTION OF DOCUMENTS RELATED TO  
T-MOBILE USA INC.'S UNJUST AND UNREASONABLE  
RURAL CALL COMPLETION PRACTICES**

Plaintiff Womble Bond Dickinson (US) LLP (“Requestor”), states as follows for its Complaint for Declaratory Relief to enforce a FOIA request made on behalf of over seventy-five rural telephone carrier clients from states across the country who have joined forces to investigate and address T-Mobile USA, Inc.’s (“T-Mobile”) illegal practice of, *inter alia*, inserting false ring tones into calls made by T-Mobile’s customers and intended for rural destinations:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, to compel the Federal Communications Commission (“FCC” or

“Commission”) to produce documents sought by Requestor’s FOIA Request<sup>1</sup> relating to the Commission’s investigation into T-Mobile’s illegal rural call completion practices, which included, at a minimum: (1) the prolonged and systematic use of false ring tones to mask its failure to complete hundreds of millions of calls destined to rural parts of the country each year for a period of several years; and (2) defiance of FCC rules that compelled T-Mobile to supervise intermediate carriers that T-Mobile contracts to deliver traffic on its behalf to rural America and to promptly remedy call completion and call quality problems resulting from the use of these intermediate carriers. T-Mobile’s unlawful practices, which reportedly impacted billions of telephone calls made by T-Mobile consumers to rural America, led to T-Mobile voluntarily agreeing to pay a \$40 million forfeiture penalty, making it by far the largest ever penalty imposed on any carrier for rural call completion failures. *See In the Matter of T-Mobile USA, Inc.*, Order and Consent Decree, DA 18-373 (April 16, 2018) (“Consent Decree”).

2. T-Mobile’s egregious conduct saved it millions of dollars in termination charges that should have been paid to rural phone companies while harming T-Mobile’s own customers, and countless consumers and businesses in rural areas throughout the country. Inexplicably, the Commission has missed its deadline to respond to the FOIA Request, and in response to Requestor’s informal follow up inquiries, has failed to provide an estimate of how long it will take to complete its review. No justification of any type has been provided for the failure to grant or deny the FOIA Request. Coincidentally, however, during the pendency of Requestor’s FOIA request, certain Commission members have been issuing announcements of their intent to support T-Mobile’s planned merger with Sprint Communications (“Sprint”), and the President of the United States has called for a boycott of T-Mobile’s primary competitor, AT&T. The

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<sup>1</sup> Attached hereto as Exhibit A is letter from G. David Carter and Cathy A. Hinger, Requestor, as Requestor, to the FCC (Feb. 25, 2019) (“FOIA Request”).

presence of a pending T-Mobile/Sprint merger review does not alter the Commission's statutory duty to respond to the FOIA Request in a thorough, transparent, and timely manner. For these reasons, court intervention and supervision over the FOIA request is necessary to the rural telcos' investigation of what may have been the most substantial and far-reaching telecommunications fraud ever perpetrated by a telecommunications carrier.

### **Jurisdiction and Venue**

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 28 U.S.C. § 2201(a).

4. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391. The Commission is headquartered in Washington, DC and relevant records are either located in or accessible in Washington, DC.

5. Plaintiff/Requestor Womble Bond Dickinson (US) LLP is a full service business law firm in the United States that, *inter alia*, serves as outside counsel to rural telephone companies in states throughout the nation. Plaintiff is the Requestor of the records on behalf of over 75 rural telecommunications company clients.

6. Defendant FCC is a United States government agency and has possession and control over the records requested by the FOIA Request.

### **Statement of Facts**

7. The Commission has repeatedly denounced call blocking tactics as posing dire threats to our nation's telecommunications system<sup>2</sup> and has for more than a decade investigated

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<sup>2</sup> See, e.g., *In re Rural Call Completion*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 33 F.C.C.R. 4199, at \*1, ¶ 1 (2018) ("*Second RCC Order*") ("All Americans should have confidence that when a call is made to them, they will receive it. But, for Americans living in rural or remote areas of the country, too often that is not the case.... [T]he[se] [call completion] failures have serious repercussions, imposing needless economic and

and fined carriers that have devised business strategies aimed at reducing the volume of calls initiated by their customers to receiving parties located in areas served by rural telephone carriers. Its recent investigation of T-Mobile led to a Consent Decree, whereby T-Mobile agreed to pay a \$40 million dollar fine for its illegal practices. *See* Consent Decree, 33 F.C.C.R. at \*10, ¶ 24. In the Consent Decree, T-Mobile admitted it engaged in two forms of illegal activity: (1) violating Section 64.2201's prohibition against the insertion of false ring tones; and (2) failing to correct call completion and/or call quality problems arising from its reliance on intermediate providers to deliver calls to consumers in certain rural areas on T-Mobile's behalf. *Id.* at \*7, ¶ 17.

8. The Consent Decree shows that T-Mobile has engaged in illegal business practices aimed at reducing, choking, impeding, deterring, and limiting call completion to rural operating company numbers ("OCNs"), despite the Commission's express prohibition of such practices since at least 2007. *Id.* at \*7, ¶ 17. The Commission's disclosure of documents related to T-Mobile's cost-avoiding strategies of inserting false ring tones into calls destined for rural

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personal costs, and potentially threatening public safety in local communities."); *In re Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 16154, 16160-61, ¶ 13 (2013) ("*First RCC Order*") (stating that, despite the Commission's prior declaratory rulings and other actions, "the record leaves no doubt that the problems of completing calls to rural areas ... continue to be frequent and pervasive throughout rural America. The inability to complete calls reliably threatens public safety and contravenes the public interest."); *FCC Enforcement Advisory*, Public Notice, 28 FCC Rcd. 10347, 10347 (2013) ("These rural consumers are harmed when calls do not reach them: businesses lose orders, medical professionals are unable to reach patients, and family members cannot check on loved ones.... Resolving rural call completion problems is a top priority of the Commission."); *In re Developing an Unified Intercarrier Comp. Regime*, Declaratory Ruling, 27 FCC Rcd. 1351, 1351-52, ¶ 2 (2012) ("[P]oor call quality, as well as [] calls ringing for prolonged periods of time for the caller but that do not ring, or ring on an extremely delayed basis, on the receiving end ... have dire consequences: Small businesses can lose customers who get frustrated when their calls don't go through. Urgent long distance calls from friends or family can be missed. Schools may be unable to reach parents with critical alerts, including school closings due to extreme weather. And those in need of help may be unable to reach public safety officials.") (footnotes omitted).

OCNs and its failure to correct call completion and call quality problems with its intermediate providers' delivery of calls to rural areas poses no competitive harm to T-Mobile. Those practices are of no competitive value since they were officially extinguished by the Consent Decree and illegal to begin with. But, the paper-trail of these unlawful tactics is highly relevant to the public, which was impacted by the inability of T-Mobile's customers to complete their calls to residences and businesses in many rural areas. The detail of T-Mobile's unlawful tactics is also highly relevant to rural carriers, none of which were compensated by the \$40 million fine T-Mobile paid to the Commission pursuant to the Consent Decree. These rural carriers deserve to know the details of T-Mobile's publicly exposed illegal practices so they may seek to hold T-Mobile accountable for its past harms. In particular, these carriers have faced countless complaints from consumers who wrongly assumed that the call completion problems were the fault of their smaller local carrier, rather than the behemoth national wireless carrier, T-Mobile. These rural carriers have been deprived not only of the revenues that they should have received from T-Mobile, but also had reputations smeared by T-Mobile's conduct, resulting in lost business and increased costs. Finally, these rural carriers who were defrauded, victimized and exploited by T-Mobile deserve to learn the details of T-Mobile's actions so that they may protect themselves should any other carrier attempt to employ such nefarious business practices in the future.

9. For this reason, on February 25, 2019, Requestor, acting on behalf of over seventy-five rural carriers, submitted the FOIA Request to the Commission requesting that the Commission disclose three categories of documents:

1. Please produce all documents in the File No. EB-IHD-16-00023247.

2. All compliance reports, if any, submitted to the Commission by T-Mobile pursuant to the Consent Decree, In the Matter of T-Mobile USA, Inc., Order and Consent Decree, DA 18-373 (April 16, 2018).

3. All reports and supporting information submitted by T-Mobile USA, Inc. to the Commission pursuant to Section III(A)(4) of the Commission's Report and Order issued in In The Matter Of Rural Call Completion, WC Docket No. 13-39, FCC 13-135 (Nov. 8, 2013).

*See* Exhibit A.

10. On March 22, 2019, the Commission notified T-Mobile of the FOIA Request because T-Mobile had previously filed a request that the Commission afford confidential treatment to the investigation files regarding T-Mobile's rural call completion misconduct. *See* Email from William Knowles-Kellett, FCC, to Kathleen Ham, T-Mobile (Mar. 22, 2019), attached as Exhibit B.

11. On April 1, 2019, T-Mobile filed with the Commission its response to the FOIA Request, asserting its justifications for its request for confidential treatment of documents in the Commission's file. *See* Letter from David H. Solomon and Russell P. Hanser, Wilkinson Barker Knauer LLP, to William Knowles-Kellett, FCC (Apr. 1, 2019), attached as Exhibit C ("T-Mobile Response").

12. On April 11, 2019, Requestor responded to T-Mobile's Response with rebuttal points to each of T-Mobile's purported justifications for its requests for confidential treatment. *See* Letter from G. David Carter and Cathy A. Hinger, Requestor, to FCC (Apr. 11, 2019), attached hereto as Exhibit D ("Requestor Rebuttal").

13. FOIA requires an agency to determine within 20 business days after the receipt of a request whether to grant or deny the request. 5 U.S.C. § 552(a)(6)(A)(i); 47 C.F.R. § 0.461(g)(1). The actual disclosure of documents is required to follow “promptly” thereafter. FOIA also permits an agency to extend the time limits up to 10 days in “unusual circumstances” (e.g., the need to collect records from remote locations, review large numbers of records, and consult with other agencies). 5 U.S.C. § 552(a)(6)(B)(i); 47 C.F.R. § 0.461(g)(1).

14. FOIA also provides a mechanism to deal with unusually burdensome requests that an agency would not be able to process within the prescribed time limits. For such requests, FOIA requires that an agency inform the requestor that the request cannot be processed within the time limits and provide an opportunity for the requester either to limit the scope of the request so that it may be processed within time frame, or negotiate a deadline for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii); 47 C.F.R. § 0.461(g)(2).

15. Assuming *arguendo* that the Commission’s 20 business day deadline did not begin to run until Requestor submitted its Rebuttal on April 11, 2019, by no later than May 8, 2019 the Commission was required to provide “written notice” if it concluded that “unusual circumstances” warranted an extension of “ten working days” to grant or deny Requestor’s FOIA Request. 5 U.S.C. § 552(a)(6)(B)(i); 47 C.F.R. § 0.461(g)(1). The Commission did not avail itself of this option because it never provided Requestor with written notice meeting the statutory requirements, which requires “written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i).

16. Nor did the Commission avail itself of the additional process contained in Section 552(a)(6)(B)(ii) of FOIA, which provides that an agency that has provided written notice of

“unusual circumstances” and cannot conclude the production within the additional ten business days may:

notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.

5 U.S.C.A. § 552(a)(6)(B)(ii).

17. Requestor has made multiple efforts to remind the Commission of its obligations and provided ample opportunity for the Commission to apprise Requestor of the status of its review and anticipated date for completion. As of the filing of this Complaint, however, the only response that Requestor has received is an email from an Attorney in the Commission’s Enforcement Bureau, Investigations and Hearings Division indicating that he was unable to provide any update on progress or timing: “I am asking—will let you know when I get an idea of time frame.” *See* Email from William Knowles-Kellett, FCC, to David Carter, Requestor (May 21, 2019), attached hereto as Exhibit B. This response is entirely insufficient to meet the Commission’s statutory duty. *See, e.g., Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (“within the relevant time period, the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions”).

18. When a federal agency fails to provide a response granting or denying the FOIA request within the required deadlines, the requestor is deemed to have constructively exhausted all administrative remedies and may proceed directly to court without any further administrative exhaustion prerequisites. *See, e.g., Bonner v. Social Security Admin.*, 574 F.Supp.2d 136, 139



(D.D.C. 2008) (“a requestor is deemed to have constructively exhausted his administrative remedies, but only if the agency has not responded before the requestor files suit”) (internal citations omitted); *Nurse v. Secretary of Air Force*, 231 F.Supp.2d 323, 328 (D.D.C. 2002) (“The defendant’s failure to respond to the plaintiff’s supplemental submission clearly fails to comply with the applicable time limit . . . and therefore the plaintiff is deemed to have constructively exhausted his administrative remedies.”). Accordingly, Requestor has constructively exhausted its administrative remedies because the Commission has failed to grant or deny the FOIA Request within the statutory deadlines.

19. Requestor’s FOIA Request has gone without any response during a politically-charged time period in which T-Mobile’s conduct is being closely scrutinized as a result of its bid to acquire Sprint. In that regard, it is noteworthy that since Plaintiff submitted its FOIA Request, three FCC Commissioners have publicly declared support for T-Mobile’s merger.<sup>3</sup> In addition, news reports have surfaced suggesting that senior members of the administration may be attempting to influence officials within the Department of Justice’s Antitrust Division to approve T-Mobile’s merger bid.<sup>4</sup> And, perhaps coincidentally, the President recently took to twitter to urge American consumers to boycott T-Mobile’s competitor, AT&T.<sup>5</sup>

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<sup>3</sup> See, e.g., Amanda Wait and Gerald Stein, *Concessions by Sprint and T-Mobile Drive FCC Approval but May Not Satisfy Enforcers*, THE NATIONAL LAW REVIEW JOURNAL (May 31, 2019, 4:53 PM), <https://www.law.com/nationallawjournal/2019/05/31/concessions-by-sprint-and-t-mobile-drive-fcc-approval-but-may-not-satisfy-enforcers/> (last visited June 10, 2019).

<sup>4</sup> See, e.g., Eric Thayer, *Senators inject a new twist into Sprint/T-Mobile merger: Trump*, KANSAS CITY BUSINESS JOURNAL (June 4, 2019, 9:27 AM EDT), <https://www.bizjournals.com/kansascity/news/2019/06/04/sprint-tmobile-merger-trump-doj-antitrust.html> (last visited June 10, 2019).

<sup>5</sup> See Craig Timberg, Taylor Telford, and Josh Dawsey, *Trump urges customers to drop AT&T to punish CNN over its coverage of him*, THE WASHINGTON POST (June 3, 2019),

20. Thus, while Requestor's FOIA Request is unrelated to T-Mobile's proposed merger with Sprint, it remains pending and unanswered at an extremely sensitive time in which both T-Mobile and the administration may share a mutual desire to minimize public awareness of T-Mobile's abuse of its position of dominance over rural telcos and brazen anti-competitive strategies. One cannot help but wonder whether the agency's failure to meet its statutory deadlines is related in part to the pending merger.

21. For these reasons, Requestor respectfully requests that the Court exercise its discretion to resolve this dispute in an expeditious manner through an *in camera* review of documents, if necessary.

#### **DEMAND FOR RELIEF**

WHEREFORE, Plaintiff requests that this Court:

1. Declare that the Commission's failure to timely process and grant the release of the records requested by Requestor is unlawful;
2. Compel the Commission, by a date certain, to complete the processing of the FOIA Request and release the requested documents to Plaintiffs or, in the alternative, turn over the requested documents to the Court forthwith for *in camera* inspection so that the Court may undertake a *de novo* assessment of whether the agency has met its burden for withholding the records;
3. Award Plaintiff its costs and reasonable attorney's fees or the value thereof in this action; and
4. Grant such other and further relief as the Court deems just and proper.

Date: June 10, 2019

Respectfully submitted,

/s/ Cathy A. Hinger

Cathy A. Hinger (DC Bar No. 473697)

G. David Carter (*to be admitted  
pro hac vice*)

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